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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 10 2009

SRC 08 004 50384

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The director later reopened the petition on the petitioner's motion, and again denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research chemist. The petitioner filed the petition shortly after beginning a postdoctoral fellowship at the Medical University of South Carolina (MUSC), Charleston. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits letters from himself and two of his former professors.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 27, 2007. Three witness letters accompanied the petitioner's initial submission. [redacted] of the University of Iowa stated:

> [The petitioner] was trained as a professional synthetic organic chemist here and completed his doctoral dissertation under my supervision. . . .

> His research required him to synthesize prenylated bioactive natural compounds isolated from plants and fungi, and to explore new methodologies to synthesize those compounds. His research work on the total synthesis of these compounds was published. . . . Through these publications, developments in new experimental techniques, intermediate structures, and methods have been disseminated to the global scientific community in the synthesis of prenylated natural compounds that were difficult to prepare by pre-existing methods. . . .
>
> In summary, [the petitioner] has had a strong postgraduate educational training in the United States. He clearly has the potential to make very significant contributions to the teaching of difficult concepts of organic chemistry to future students . . . as well as the ability to conduct organic/medicinal chemistry research related to important aspects of the health-care industry.

University of Iowa Professor [redacted] offered general praise for the petitioner's work at that institution, including the petitioner's skills as a presenter of his work, but stated [redacted] *[sic]* is more qualified to provide a detailed evaluation." As we have seen, [redacted] identified the petitioner's research specialty but provided little information about the importance or impact of that work. Assertions about the petitioner's "potential" are, by nature, speculative.

MUSC Professor [redacted] the petitioner's supervisor at the time of filing, described the petitioner's work in [redacted] laboratory:

> The chemical synthesis skills possessed by [the petitioner] have enabled him to be invaluable to our innovative research that focuses on the synthesis of potent compounds that specifically inhibit calpain 10 and to develop specific calpain 10 fluorescent substrates. We think these specific calpain 10 inhibitors and fluorescent substrates will be effective therapeutic agents in the prevention of cell death in injured epithelial cells of the kidney, and in other tissues. This research has led to a patent application from our laboratory and a manuscript that will be submitted to an international peer reviewed journal soon. In summary, [the petitioner] has the scientific training as a synthetic organic chemist to help in drug discovery research projects and conducting medicinal chemistry health-related research.

From [redacted] description, as of the filing date it was too early to gauge the impact of the petitioner's work at MUSC. The petitioner had been at MUSC less than six months at that point, and no results of that work had yet been published or patented. We note that the petitioner's initial submission contained no indication that the petitioner was working on developing new antibiotics.

On March 14, 2008, the director issued a request for evidence, instructing the petitioner to "describe specifically all of [his] prior achievements and how these have influenced the field." The director requested evidence of citation of the petitioner's published work, as well as "letters from

independent researchers who know of [his] work by reputation established by his research successes."

In response, the petitioner submitted a copy of a journal article that contains an independent citation of the petitioner's work with [redacted]. At the time, the petitioner submitted no other documented citation of his work.

The petitioner also submitted a June 13, 2008 statement in which he described his work in technical detail. One example follows:

> Arieianal . . . has been found to be insecticidal against leaf cutter ants in . . . places where leaf cutter ants infestations are responsible for annual loss in millions of dollars. While this interesting natural compound was isolated by Wiemer group in a very small quantity . . . , there was no way to determine additional bioactivities beyond the reported insecticidal activities on leaf cutter ants. In light of this, I . . . successfully synthesized arieianal. . . .
>
> I was [also] able to complete the synthesis of . . . similar compounds from the same family such as antitumor montadial A and isopiperoic acid. . . . [T]he new chemical steps in these publications are synthetic paradigms for many other synthetic chemists involved in prenylation research.

The petitioner asserted that his "cutting edge research has influenced the syntheses of medicinal compounds by several renowned chemists in the field for drug discovery purposes." The petitioner also asserted that his work allowed another researcher, [redacted] of the University of Iowa, to identify isopiperoic acid as "a novel and potent antibacterial agent against super bugs" that are resistant to common antibiotics. Copies of electronic mail messages between the petitioner and [redacted] discuss efforts to find the best concentration of various compounds in water and in another solvent. One message indicates that one of the dilutions was effective against *Staphylococcus aureus*. The messages date from February 2005, more than two years before the filing date. The record does not show that the compound is now in wide use as an antibiotic, or that clinical trials are underway.

The petitioner submitted new witness letters. Although the director had requested letters from independent witnesses, all of the new witnesses work at MUSC. [redacted], Director of Diagnostic Microbiology at MUSC, stating that the petitioner's compound, discussed above, "may not be a 'magic bullet' . . . it could be a welcome option against these resistant organisms." Lamenting "a lack of interest by pharmaceutical companies to develop new antibiotics," [redacted] stated that the petitioner "should be afforded a waiver of labor certification . . . because of his achievement in the discovery of a novel drug candidate as a potent antibiotic in nosocomial infections."

[redacted] stated that the petitioner's "discovery of a new lead antimicrobial compound . . . is a great and rare achievement among his colleagues." [redacted] cited "the enormous time, money and efforts directed to such discovery even in big pharmaceutical settings," which appears to contradict [redacted] allegation of a "lack of interest by pharmaceutical companies to develop new antibiotics."

[redacted] of South University, Savannah, Georgia, who is also an adjunct professor at MUSC, stated:

> [The petitioner] is one of few young fellows that has made great achievements in the field of chemistry. . . .
>
> Hundreds of natural chemical compounds have been extracted from Piper species solely for medicinal values. . . . Unfortunately, the existing synthetic methods to carry out this chemical transformation were inadequate. . . . [The petitioner] has been able to find an excellent way to solve this aged problem in chemistry. He has invented a set of reaction conditions that allowed the synthesis of prenylated natural compounds in high yields, under mild chemical conditions without the use of any toxic reagents.

[redacted] praised the petitioner's "discovery of an entirely new antibiotic to fight severe infections in hospital patients," and asserted that "he has not published a journal article on this work for propriety [sic] reasons." [redacted] did not explain what measures, if any, the petitioner has taken to establish his priority in this research. If the petitioner has not yet widely announced his development of this new antibiotic, then its impact on the field is necessarily limited.

The director denied the petition on September 20, 2008, stating that the petitioner failed to provide documentary evidence that set his work apart from that of others in the field. The director noted the petitioner's minimal publication and citation record, and the lack of "independent corroboration" of the claims of MUSC researchers.

The petitioner filed a motion to reopen the petition on March 31, 2009, stating: "I have a positive evidence of my achievements in the field of chemistry through my publications and a new job offer to work specifically on the continuation of my research from my PhD for antibiotic drug discovery. Similarly, I have a new publication [and] some citations from independent researchers."

The petitioner submitted a letter from [redacted], Senior Research Biochemist at Merck & Co., Inc., West Point, Pennsylvania. [redacted] described the petitioner's published findings and stated that the petitioner "is considered to be a top notch scientist with significant and solid achievements in the field."

The petitioner described [redacted] as "an independent scientist in the field that recognized my work on a professional level by citations." The article in which [redacted] cited the petitioner's research placed her at the University of Iowa. [redacted] was a co-author of the citing paper,

essentially self-citing his own prior work with the petitioner; indeed, the citation is in reference to "*our* ongoing interest in chemotherapeutic chemistry" (emphasis added). The article was submitted for publication in September 2005, no more than two months after the petitioner left [redacted] laboratory. The record, therefore, strongly indicates that the petitioner and [redacted] both worked with [redacted] at the same time. [redacted] subsequent employment at Merck does not make her an independent witness.

The petitioner submitted three other papers containing citations to his work. One of these is an article by the petitioner and [redacted], self-citing a previous article, which leaves two independently citing articles.

The director granted the petitioner's motion to reopen, but affirmed the denial of the petition on June 17, 2009. The director concluded that, if the petitioner's work were as important as the petitioner has claimed, there would have been a stronger reaction to that work outside of the universities where the petitioner performed that work. The director noted the minimal citation of the petitioner's work (and, as we have noted, some of those citations are self-citations rather than independent citations).

The petitioner appealed the decision on June 29, 2009. On appeal, the petitioner states: "it takes many years to complete and publish new research findings that cite previous research findings." The record does not support this claim. The record contains an article submitted for publication in January 2007, which cites several articles from 2006. Another article, submitted for publication in August 2006, cites articles from 2005 and 2006 (including one of the petitioner's articles). With regard to the petitioner's own published work, the petitioner was able to cite two articles from 2004 in an article submitted for publication in February 2005. Clearly, there is not necessarily a turnaround of several years between publication and citation.

The petitioner reasons: "the fact t[h]at the research that I just published in January of 2009 has not been cited in June 2009 does not mean that it will not be cited in years to come." This is true, as far as it goes, but neither does it mean that the petitioner's work *will* "be cited in years to come." We must base our decision on the available evidence of record as it existed at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Speculation about future citation of the petitioner's work is not evidence; it is self-serving conjecture. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner observes that, in his most recent employment, he worked "to develop new antibiotics" to fight drug-resistant pathogens. This speaks to the intrinsic merit of the petitioner's work. Certainly there is much merit in developing life-saving drugs, but the waiver is not automatically available to every researcher performing such work. The petitioner must show his impact in that specialty. He has emphasized his work at the University of Iowa in that regard, but the record does not show any further progress in developing the compounds he identified there in 2005.

The petitioner submits two letters from University of Iowa professors, which do little to refute the conclusion that the petitioner's impact has been mostly confined to the University of Iowa and MUSC. The letters, from [redacted] and [redacted] are effectively identical to those witnesses' earlier letters from 2007, re-dated 2009 but otherwise apparently unchanged.

The record indicates that the petitioner is a dedicated scientist who has earned the respect of his mentors and collaborators. The information regarding a new drug to fight antibiotic-resistant bacteria is interesting and hints at great potential, but the silence of the broader scientific community regarding this development is telling. It may be that, for "propriet[ar]y reasons," the petitioner has consciously chosen to suppress information about this potential drug, but if so, then the necessary consequence of this action is that few people even know enough about the compound to comment on its importance. It may be that the petitioner is simply waiting for the right time to publish, or it may be that research on the compound was abandoned due to concerns about its safety or efficacy. The record does not afford us enough evidence to distinguish between these alternatives. The record shows that the petitioner's work has promise, but stops short of demonstrating that this promise has been realized to any significant extent.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.